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# Governance through publicity: anti-social behaviour orders, young people and the problematization of the right to anonymity

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*Since the early 20<sup>th</sup> century, young people under eighteen involved in legal proceedings have been granted a degree of protection from the glare of media publicity. One controversial consequence of recent reforms of the anti-social behaviour order (ASBO), however, is the incremental reduction in the anonymity rights available to those subject to the mechanism, together with calls by the Home Office for details of such individuals to be publicised as a matter of course. Numerous commentators have criticised the Government accordingly for reinstating the Draconian practice of 'naming and shaming'. This paper contends that these developments can be usefully analysed through the lens of Foucault's work on state governance. It explores, in particular, how challenges to the right reflect both the fall of anonymity and the rise of publicity in the governance of what I term 'ASBO subjects', together with the communities in which they live, under 'advanced liberal' rule.*

Keywords: governmentality; anti-social behaviour; ASBO; children and young people; anonymity.

## INTRODUCTION

In his later writing, Michel Foucault examines the various and complex ways in which power is exercised in society. Political rationalities, as Foucault explains, are ways of rendering reality knowable for the purpose of governance. Contemporary state governance, he suggests, consists of a triangle of such rationalities; sovereignty, discipline and government,<sup>1</sup> which together he terms 'governmentality'. Early sovereign technologies entailed the use of repressive force by the state, in an effort to establish and maintain effective control over geographical territory, exemplified by the spectacle of the public execution. Of greater interest to Foucault, however, are the complex modern forms of governance, exacted through a combination of disciplinary and governmental technologies, operating not simply repressively but *productively*, designed to strengthen the state by improving the very soul of the subject. Discipline, on the one hand, entails the production of docile and co-operative individuals (through processes of surveillance, classification and normalization) and populations (through

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<sup>1</sup> M. Foucault, 'Governmentality' in G. Burchell, C. Gordon and P. Miller, *The Foucault Effect: Studies in Governmentality* (1991).

processes of bio-power). Government, on the other, reflects more recent attempts by the state to exercise power 'from a distance' by encouraging individuals to engage independently in their own self-governance, and the governance of others, in line with its own objectives.

An Anglo-Saxon Neo-Foucauldian school has developed the concept of governmentality, applying it to the operation of power within the modern liberal democratic state. Nikolas Rose, in particular, maps the genealogy of contemporary Western liberal democracies using three political rationalities: classical, social and advanced liberalism.<sup>2</sup> Rose equates advanced liberal rule with the role of neo-liberalism in the 'death of the social', deploying the concept of government to explain the harnessing (or 'responsibilization'<sup>3</sup>) of a variety of statutory, voluntary and commercial actors and organisations in place of the centralised disciplinary techniques of state welfare. He explores, in particular, the rise of what he terms 'ethopolitics', by which individuals are encouraged to continually work on themselves ethically to secure the well-being of themselves and their dependents. As he explains:

If discipline individualizes and normalizes, and biopower collectivizes and socializes, ethopolitics concerns itself with the self-techniques by which human beings should judge themselves and act upon themselves to make themselves better than they are.<sup>4</sup>

Of particular importance for Rose, as we shall see, is the role of 'community' as both ethopolitical target and process, increasingly implicated in the state's governmental strategies.<sup>5</sup>

Neo-Foucauldian theorists continue to explore the apparent rise of advanced liberal forms of governance within the specific field of crime control,<sup>6</sup> including recent analysis of youth justice policy under New Labour.<sup>7</sup> Similarly, I want to examine the

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<sup>2</sup> N. Rose, *Powers of Freedom: Reframing Political Thought* (1999).

<sup>3</sup> D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001), pp. 124-7.

<sup>4</sup> N. Rose, 'Community, citizenship and the Third Way' in D. Meredyth and G. Minson (eds.) *Citizenship and Cultural Policy* (2001), p. 18.

<sup>5</sup> N. Rose, 'The death of the social? Refiguring the territory of government' (1996) 25(3) *Economy and Society* 327 at 331-7.

<sup>6</sup> K. Stenson and A. Edwards, 'Rethinking crime control in advanced liberal government', in K. Stenson and R. R. Sullivan (eds.) *Crime, Risk and Justice* (2001); K. Stenson, 'Crime control, social policy and liberalism' in G. Lewis, S. Gewirtz and J. Clarke (eds.) *Rethinking Social Policy* (2000); N. Rose, 'Government and control' (2000) 40 *Brit J of Crim* 321; D. Garland, 'Governmentality and the problem of crime: Foucault, criminology, sociology' (1997) 1(2) *Theoretical Criminology* 173.

<sup>7</sup> B. Vaughan, 'The governance of youth: disorder and dependence?' (2000) 9(3) *Social and Legal Studies* 347; R. Smith, 'Foucault's law: the Crime and Disorder Act 1998' (2000) 1(2) *Youth Justice* 17; J. Muncie and G. Hughes, 'Modes of youth governance: political rationalities, criminalization and resistance' in J. Muncie, G. Hughes and E. McLaughlin, *Youth Justice: Critical Readings* (2002).

various ways in which advanced liberal rule seeks to govern through both agents of crime control and young offenders themselves within the particular (constructed) field of ‘anti-social behaviour’.<sup>8</sup> At the heart of government initiatives in this area is the anti-social behaviour order (ASBO); a civil order directed towards the prevention of future anti-social behaviour through the deterrent effect of criminal sanction on breach.<sup>9</sup> Recently, the Government has challenged the right to anonymity of those (predominantly young) people targeted by the ASBO; what I term ‘ASBO subjects’, by encouraging greater use of publicity by local agencies while simultaneously reducing the legal rights protecting children from publicity under the 1933 Children and Young Persons Act (‘the 1933 Act’). In this paper, I suggest that the rise of the ‘naming and shaming’ of the ASBO subject can be usefully explained in terms of the complex and contradictory governmental mentalities and technologies of the advanced liberal state.

In so doing, I acknowledge from the outset criticisms that the tendency to equate advanced liberal forms of rule with the governmental techniques of neo-liberalism provides only a cursory analysis of contemporary crime control in England and Wales.<sup>10</sup> I return instead to Foucault’s sovereignty-discipline-governmentality triangle, recognising, as Stenson does, the synchronic rather than diachronic interrelationship between these three rationalities.<sup>11</sup> This aspect of Foucault’s work has two important implications for a theory of contemporary governance. First, rather than positioning advanced liberalism as diametrically opposed to the social, it explains the continuance of social forms of governance within the advanced liberal state. Thus, while Rose might talk of the death of the social, I prefer what Pavlich terms the rise of ‘co-social governance’.<sup>12</sup> Second, a diachronic model of advanced liberal governance highlights

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<sup>8</sup> For a general introduction to the Government’s ‘Respect’ agenda, see E. Burney, *Making People Behave: Anti-social behaviour, Politics and Policy* (2005). For a recent governmental analysis see J. Flint and J. Nixon, ‘Governing neighbours: anti-social behaviour orders and new forms of regulating conduct in the UK’ (2006) 43(5/6) *Urban Studies* 939.

<sup>9</sup> Crime and Disorder Act (CDA) 1998, s. 1. The ASBO has received almost universal criticism from academic commentators. Criticisms focus upon both the legal and criminological implications of the order. Criminological assessments note the high breach rate, bringing many young people prematurely within the criminal justice system, together with the failure to tackle the underlying causes of anti-social behaviour: E. Burney, ‘Talking tough, acting coy: what happened to the anti-social behaviour order?’ (2002) 41(5) *The Howard Journal* 469; P. Squires with D. Stephen, ‘Rethinking ASBOs’ (2005) 25(4) *Critical Social Policy* 517. Legal criticisms highlight the hybrid nature of the order, allowing an individual to be brought within the ambit of the criminal law without the benefit of the procedural legal protections granted to criminal defendants, and the breadth and vagueness of the definition of anti-social behaviour: Ashworth *et al.*, ‘Neighbouring on the oppressive: the Government’s “anti-social behaviour order” proposals’ (1998) 16(1) *Criminal Justice* 7.

<sup>10</sup> D. Cowan and D. Lomax, ‘Policing unauthorised camping’ (2003) 30(2) *JLS* 283 at 287-9.

<sup>11</sup> K. Stenson ‘Crime control, governmentality and sovereignty’ in R. Smandych (ed.) *Governable Places: Readings on Governmentality and Crime Control* (1999), p. 54.

<sup>12</sup> G. Pavlich ‘Transforming images: society, law and critique’ in G. Wickham and G. Pavlich, *Rethinking Law, Society and Governance: Foucault’s Bequest* (2001), p. 4.

the continued relevance of sovereign rationalities and technologies of crime control operating alongside the more subtle disciplinary-governmental complexes.

Concentrating for a moment upon the latter consideration, I find convincing Stenson's argument that contemporary sovereign rule should not be dismissed as merely atavistic, archaic and irrational. In fact, as Stenson contends, 'use of force, symbolic representations of force and juridical authority ... is a sophisticated feature of current social reality.'<sup>13</sup> There is evidence, first, of the continued relevance, as a consequence of the neo-conservative discourses underpinning Government policy, of coercive technologies to control those troublesome groups unwilling or unable to engage in regulated freedom.<sup>14</sup> Second, Stenson in particular argues that advanced liberal crime control increasingly deploys forms of rule designed to resist challenges to the state's sovereignty over various political and geographical territories.<sup>15</sup>

The paper deliberately adopts the methodology of 'discursive governmentality',<sup>16</sup> which relies upon textual analysis for its understanding of the rationalities and technologies of advanced liberal governance. On the one hand, it examines the *political* discourses behind youth anonymity in England and Wales as expressed by New Labour. Accordingly, it employs Government policy documents, ministerial statements and formal guidance on the use of publicity to support its claims about the changing central government rationalities underpinning the control of youth crime and their impact upon governance through anonymity. However, recognising that the operation of the right to anonymity is regulated by law as well as politics, the paper also explores the *legal* infrastructure behind the right to anonymity, and its role in providing 'authorization',<sup>17</sup> for these governmental techniques or, as Tadros puts it, its importance as 'an interface through which governmental decisions can take effect by adjusting the operations and arrangements of the disciplinary mechanisms'.<sup>18</sup> Thus, the paper engages in a genealogy of the right to anonymity, following its inception in the 1933 Act, through legislative reform and judicial precedents on its appropriate implementation, together with the treatment under the Human Rights Act of ASBO publicity released by public authorities.

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<sup>13</sup> Stenson, op. cit. n. 11, p. 63.

<sup>14</sup> M. Dean, *Governmentality: Power and Rule in Modern Society* (1999), Ch. 9.

<sup>15</sup> K. Stenson, 'Reconstructing the government of crime' in Wickham and Pavlich, op. cit. n. 12, pp. 105-8.

<sup>16</sup> K. Stenson, 'Sovereignty, biopolitics and the local government of crime in Britain' (2005) 9(3) *Theoretical Criminology* 265.

<sup>17</sup> N. Rose and M. Valverde, 'Governed by law?' (1998) 7(4) *Social and Legal Studies* 541 at 550.

<sup>18</sup> V. Tadros, 'Between governance and discipline: the law and Michel Foucault' (1998) 18(1) *Oxford Journal of Legal Studies* 75 at 79.

It is, of course, important to recognise from the outset the limitations inherent in the methodology of discursive governmentality. Concentrating in this way upon the rationalities operating at the highest level of governance; the political and jurisprudential discourses of national government and the higher courts, my analysis inevitably fails to consider effectively the complex ways in which technologies of governance are implemented at the level of the local. Foucault has often been criticised for failing to recognise the possibility of resistance in his work on discipline.<sup>19</sup> This paper, on the other hand, explores the potential for reinterpretation of advanced liberal rationalities, and modification of the operation of technologies such as the ASBO, by both local agencies of social control (for instance, the local executive agency, or the trial judge deciding on the merits of their applications for an order) and the ASBO subject him or herself.

The paper therefore accepts that, to meaningfully appreciate the potential for resistance to the rationalities and technologies of governance operating around the ASBO subject, further analysis in this field must move towards what Stenson terms 'realist governmentality', which '[supplements] discourse analysis of mentalities with grounded, empirical, realist analysis of governing practices, and [draws] on both bodies of theory and research,'<sup>20</sup> in order to better understand the practical distribution of power around the ASBO subject. Nevertheless, as an initial attempt to unravel the complex (and seemingly contradictory) mentalities in this area of law, and given the inevitable limitations of space, my discursive focus upon 'high' politics and law provides, in my opinion, a useful starting-point for further socio-legal analysis in this area. Moreover, every effort has been made to ensure that empirical research is used, where available, to shed light upon the realities of local implementation.

## 1. A GENEALOGY OF YOUTH ANONYMITY

Discourses of mainstream criminal justice, drawing upon the classical construction of the rational, free-willed subject, tend to emphasise the importance of accountability, and punishment, of individuals for wrongdoing. However, state governance of low-level youth disorder has been affected to a greater degree by the tenets of what criminologists term welfarism.<sup>21</sup> In fact, it is possible to identify two strands of welfarism that have

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<sup>19</sup> L. McNay, *Foucault: A Critical Introduction* (1994), pp. 100-104.

<sup>20</sup> Stenson, op. cit. n. 16, p. 266.

<sup>21</sup> H. Hendrick, 'Histories of youth crime and justice' in B. Goldson and J. Muncie, *Youth Crime and Justice* (2006).

developed around troublesome young people, best explained using Garland's distinction between criminologies of 'everyday life' and 'the other'.<sup>22</sup> On either interpretation disorderly youths are reconstructed as non-responsible for their conduct, but for markedly different reasons.

Welfarist criminologies of everyday life treat low-level youth disorder as merely symptomatic of the natural processes of child development:

For the majority of 'offending' children and young people, their anti-social behaviour [is] essentially petty and opportunistic and little more than a transitory phase that they [will] grow out of.<sup>23</sup>

The assumption, then, is that the 'anti-social' youth is always already capable of exercising responsible freedom naturally over time without intervention by the state. Alternatively, welfarist criminologies of the 'other' treat disorderly behaviour by young people as the product of individual or social pathology. Consequently, discourses of vulnerability temper (though never fully replace) those of blame, and legislative measures are often enacted to facilitate effective support for young offenders' needs. As Parton explains:

A major assumption of welfarism is that, apart for a very small number, because the depraved are essentially deprived or misguided, everyone is treatable or can be rehabilitated.<sup>24</sup>

Over much of the last century, youth justice in England and Wales was compartmentalised and reconfigured under a welfarist criminology of the other as a gateway to the burgeoning welfare state, with young offenders subject to the growing expertise of its agencies and professionals. These developments, of course, reached their high-water mark during the 1960s with the enactment of the 1969 Children and Young Persons Act, designed to remove young offenders wholly from the criminal justice system and into the hands of the social work profession.<sup>25</sup>

It is often assumed that the rise of welfarism reflects the compassionate and humanitarian zeal of early 20<sup>th</sup> century reformers, 'child savers', dedicated altruistically to the protection of young people. An alternative perspective, however, is propounded by revisionist theorists, such as Foucault, who conversely explain the rise of the expertise and practices of welfarism as a mechanism of control. In particular, they argue

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<sup>22</sup> Garland, op. cit. n. 3, p. 137.

<sup>23</sup> B. Goldson, 'Children in trouble: state responses to juvenile crime' in P. Scraton, "*Childhood in Crisis*"? (1997), p. 124.

<sup>24</sup> N. Parton, "'Problematics of government', (post) modernity and social work' (1994) 24 *Br J Social Wk* 9 at 22.

<sup>25</sup> A. Bottoms 'On the decriminalisation of English juvenile courts' in J. Muncie et al, op. cit. n. 7.

that the intervention of social workers into the lives of young offenders is a disciplinary system, organised around the medium of the social, and aimed at the alignment of the behaviour of targeted individuals with the governmental objectives of the state. As Stenson explains:

It is possible to see the role of social work in trying to extend the practical and inner capacities of citizenship, as part of a wider spread of governmental power, based on surveillance and moving beyond the institutional sites of the prison, school and so on into the wider society.<sup>26</sup>

Rather than mere altruism, social work developed around the young offender to prevent the loss of otherwise valuable human resource to criminality; what Donzelot describes as ‘the squandering of vital forces, the unused or useless individuals’.<sup>27</sup> Accordingly, a ‘tutelary complex’ grew up in an effort to overcome the social and individual pathologies of both young offenders and their families.<sup>28</sup>

The principle of youth anonymity in England and Wales arose as part of a host of early 20<sup>th</sup> century welfarist reforms. Given legal weight, first, by the 1908 Children Act, then the consolidating 1933 Act and more recently the Youth Justice and Criminal Evidence Act 1999 (‘the 1999 Act’), it provides protection from media scrutiny to young people under eighteen involved in both civil and criminal legal proceedings. It has received scant attention from commentators, however; apparently accepted without question as a necessary component of child welfare. Nevertheless, as with other components of welfarist youth justice policy, the principle might be analysed straightforwardly as another example of the altruism of early welfarist legislators. One might suppose it was designed to shield young people from the harm that they would otherwise suffer from association with particular legal proceedings. Historically, young offenders received the strongest legal protections given, one might assume, the particularly strong social stigma that accompanies publicity of criminal proceedings, and the consequent possibility of physical harm through vigilantism or the psychological damage caused by social exclusion. Moreover, unlike adult offenders, in relation to whom ‘the unspoken premise seems to be that being named in the newspaper is a part of the sanction,’<sup>29</sup> the perceived moral non-responsibility of children would have rendered problematic the justice of publicity as punishment.

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<sup>26</sup> K. Stenson, ‘Social work discourse and the social work interview’ (1993) 22(1) *Economy and Society* 42 at 50.

<sup>27</sup> J. Donzelot, *The Policing of Families* (1979), p. 25.

<sup>28</sup> *Id.*

<sup>29</sup> J. R. Spencer, ‘Naming and shaming young offenders’ (2000) 59(3) *Cambridge LJ* 466 at 466.



It is contended, however, following the revisionists, that the right to anonymity is explainable not simply as an act of legislative altruism, but simultaneously as a technology of social control: the principle must be reconsidered as an ethopolitical strategy. Specifically, I would argue, it was the ‘discovery’ of the impact of ‘labelling’ upon young people by positive criminologists in the post-war period that provided ideological support for its role in their governance.<sup>30</sup>

Advocates of labelling theory argue that formal or informal classifications of young people as deviant encourages those individuals to actively reject moral norms and descend into more serious criminality. In governmental terms, at the heart of this ‘ethopolitics of labelling’ are both welfarist criminologies of everyday life and the other. Troublesome youth are either judged naturally equipped to engage eventually in responsible freedom, or else ‘pathological’ but reformable through the disciplinary processes of social work. In either case, their inevitable progress to effective self-governance is threatened by the process of negative classification. In its hey-day during the 1960s and 1970s, the ethopolitics of labelling had a considerable impact upon the governance of low-level youth disorder in England and Wales, contributing to the welfarist rationality (displaced, as we will see, by New Labour’s Respect agenda) that formal intervention by the criminal justice system to control troublesome conduct should be avoided wherever possible.<sup>31</sup> The right to anonymity was a key component of this governmental strategy, designed to shield the subject from the particular stigma of community disapproval which might otherwise reinforce the subject’s self-conception as deviant.

Nevertheless, the principle of youth anonymity has been confronted since its inception by competing discourses promoting the value of publicity of legal proceedings. Historically, the predominant challenge has been that posed by classical, rather than advanced liberal, rule and its abstract, constitutional concern with the defence of individual freedom against state tyranny. Importance tends to be placed, particularly, upon the principle of open justice. As Lord Bingham of Cornhill has written *in curia*, ‘it is a hallowed principle that justice is administered in public, open to full and fair reporting of court proceedings so that the public may be informed about the justice administered in their name’.<sup>32</sup> That a balance was struck, from the outset,

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<sup>30</sup> E. Lemert, *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behaviour* (1951); H. S. Becker, *Outsiders: Studies in the Sociology of Deviance* (1963).

<sup>31</sup> Labelling theory within the academy, and consequent calls for a retraction of formal intervention in youth crime, reached its criminological peak in the 1970s with the publication of Schur’s *Radical Non-Intervention* (1973).

<sup>32</sup> *McKerry v Teesdale and Wear Valley Justices* [2001] EMLR 5 at 3.

between classical and welfarist rationalities in law explains why youth anonymity has been seldom afforded as an unconditional right. In civil trials and criminal trials not before the Youth Court, for example, there has always been a presumption in favour of publicity (now regulated by section 39 of the 1933 Act and section 45 of the 1999 Act respectively). Before the Youth Court, there was originally an absolute prohibition on publicity under the 1933 Act, reflecting the importance placed upon protecting the young offender. However, subsection 49(4A), introduced by the 1997 Crime (Sentences) Act, now provides courts with the power to overturn that presumption if they judge that to do so would be in the public interest.

It is the particular interface between the right to anonymity and the ASBO that concerns us here, of course. Specifically, it is the contention of this paper that recent political and legal challenges to the principle provide an interesting example of many of the characteristics of advanced liberal crime control identified by the governmentality school. First, though, an explanation of the nature of these challenges to the principle is required. Since the creation of the ASBO, the right to anonymity, as it applies to the ASBO subject, has faced a sustained assault by New Labour. The first evidence of Government concerns was political. In 2001, Jack Straw, the then Home Secretary was reported as claiming that:

There may be grounds for imposing reporting restrictions during application proceedings concerning a juvenile, but in my view the situation changes if an ASBO is made.<sup>33</sup>

He then proceeded to suggest that there should, in fact, be a presumption in favour of publicity in such circumstances. Subsequently, this position found its way into official policy, in the form of Home Office guidance which now explicitly advocates the identification of the ASBO subject as part of a post-application media strategy. ASBO publicity involving young people, it demands, is to be the norm rather than the exception.<sup>34</sup>

What began as a political problematization, however, developed quickly into a legal one, with criticism levelled eventually at the anonymity rights granted by the 1933 Act. It soon became clear to the Government that the structure of the legislation hindered the pursuit of greater publicity of the ASBO subject. Application for an original, or 'stand alone' ASBO is sought before the magistrates' court, and as such section 39 applies to these proceedings, creating a presumption in favour of publicity. In

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<sup>33</sup> P. Humphries, 'Shame faced', *The Guardian*, 24 October 2001.

<sup>34</sup> Home Office, *Guidance on Publicising Anti-social Behaviour Orders* (2005), p. 2.

a number of other ASBO proceedings, however, it was section 49 (which reverses this presumption), rather than section 39, that governed the right to anonymity. Section 49 applied to the 'CRASBO' imposed following a criminal conviction,<sup>35</sup> together with breach proceedings, where those proceedings take place before the Youth Court. The Government sought accordingly to reform the law in these areas. The 2003 Anti-social Behaviour Act revoked section 49 for the purpose of proceedings for a CRASBO brought before the Youth Court, while the 2005 Serious Organised Crime and Police Act replaced it in breach proceedings.<sup>36</sup> The upshot is that all ASBO proceedings are now governed by section 39 of the 1933 Act.

Both the Government's political demands for greater use of publicity and the legal changes made to the 1933 Act have attracted the strident criticism of commentators including Professor Rod Morgan, ex-chairman of the Youth Justice Board, Al Aynsley-Green, the Children's Commissioner and Alvaro Gil-Robles, the previous Commissioner for Human Rights of the Council of Europe.<sup>37</sup> The anger of Parliamentarians too is evident in the debates over the anonymity reforms contained in both the Anti-social Behaviour and Serious Organised Crime and Police Bills.<sup>38</sup> Notably, Baroness Stern argued, in that context, that the Government had shown itself

willing, by sleight of hand, to throw in the rubbish bin the perceived wisdom of all those who care for the rights of children and who fought for them for nearly two centuries.<sup>39</sup>

In each case, welfarist discourses (notably, tending to take the form of altruistic rather than governmental arguments) continue to pose a political challenge to the dismantling of the principle of youth anonymity.

Importantly, criticism has refocused, particularly, upon the impact of labelling. Elizabeth Burney, for instance, has warned that

[t]he practical arguments in favour of publicising ASBOs notwithstanding, the practice is likely to be particularly harmful where young people are involved, as well as unwise.

She continues 'shame by itself, without any reintegrating process is likely to be counter-productive, resulting in rejection of the ethical standpoint of the accusers'.<sup>40</sup> In line with

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<sup>35</sup> CDA 1998, s. 1C.

<sup>36</sup> SOCPA, s. 141.

<sup>37</sup> C. Dyer, "Naming and shaming" guidance condemned', *The Guardian*, 25 February 2006; M. Berlins 'Naming and shaming is a con', *The Guardian*, 27 February 2006; A. Gil-Robles, *Report by the Commissioner for Human Rights on his visit to the United Kingdom, 4th – 12th November 2004*, CommDH(2005)6.

<sup>38</sup> HL Hansard, 17 Sept 2003, col 1023; HL Hansard, 6 April 2005, cols 772-774.

<sup>39</sup> HL Hansard, 6 April 2005, col 774.

the analysis set out above, interestingly Burney's challenge operates at both an altruistic and governmental level. She raises an altruistic concern, on the one hand, that publicity may harm the ASBO subject by encouraging his or her social exclusion. On the other, however, she warns that publicity will prove not only harmful but 'unwise', implying a governmental concern that labelling, exacerbated by publicity, impacts negatively upon efforts to either safeguard the subject's natural capacity for ethical self-governance, or else undermines his or her effective reconstruction through social work.

This article explores the rationale behind the Government's desire for greater publicity of the ASBO subject. In doing so, it explains its problematization of youth anonymity in terms of the often complex and contradictory rationalities and technologies underpinning the governance of 'anti-social behaviour' in England and Wales. The first part of our genealogy of youth anonymity has shown that challenges to the principle stemmed, historically, from an abstract, constitutional demand for open justice. Alternatively, I argue below that the current assault against the principle in the ASBO context clearly reflects the concerns of advanced liberal forms of rule. I contend further that the justifications for ASBO publicity provide a valuable illustration of the complex synchronic relationship between sovereign, disciplinary and governmental mentalities within advanced liberal governance. There are three parts to the analysis. The first part seeks to ascertain the reasons for *the fall of anonymity of the ASBO subject as a governmental technique*, while the second and third parts analyze the simultaneous *rise of governance of that subject through publicity*.

## 2. NEO-CONSERVATISM AND THE FALL OF YOUTH ANONYMITY

Ultimately, the fall of anonymity of the ASBO subject is best explained as a corollary to contemporary challenges to the expertise and practices of welfarism under advanced liberal rule.<sup>41</sup> Members of the governmentality school tend to argue that the rationalities and technologies of advanced liberalism are the product of *neo-liberal* politics. This paper suggests, instead, that the governance of 'anti-social behaviour' cannot be understood without reference to the role of the residual moralism of *neo-conservatism*

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<sup>40</sup> Burney, op. cit. n. 8, p. 97. See, also, the use of labelling theory by Rod Morgan (S. Goodchild, 'Demonised: We lock them up. We give them ASBOs. But is our fear of kids making them worse?', *The Independent*, 23 April 2006) and in written responses to the Home Affairs Select Committee (*Report into Anti-social Behaviour* (2005), para. 131).

<sup>41</sup> Exemplified by the claim of Louise Casey, director of the Government's Anti-social Behaviour Unit, that 'youth workers, social workers and the liberal intelligentsia' who had attacked the ASBO were 'not living in the real world': L. Ward, 'ASBO chief rounds on liberal critics', *The Guardian*, 10 June 2005.

in the reconstruction of the characteristics of ‘anti-social’ youth.<sup>42</sup> Neo-liberal and neo-conservative discourses are symptomatic of the rise of advanced liberal approaches to the governance of crime and anti-social behaviour, and share one important characteristic: both encourage the transfer of responsibility for the governance of that conduct away from the state. Where the two discourses differ fundamentally, however, is the target of their respective responsabilization strategies. While neo-liberalism encourages the transfer of *policing responsibilities* from the state to agencies and individuals within the private sphere (a process explored in greater detail below), neo-conservatism demands that *the targets of crime control*, including the ASBO subject, take greater responsibility for their own troublesome conduct. This construction of the offender is particularly evident within the discourses underpinning the Respect agenda. While neo-conservatism has been repackaged to reflect the Government’s ostensibly communitarian political philosophy,<sup>43</sup> there is little difference, to my mind, between the two ideologies in terms of their understanding of the ‘anti-social behaviour’ of young people.

Neo-conservatism challenges the knowledge claims of both welfarist criminologies of everyday life and the other. Notwithstanding the former’s construction of the ‘anti-social’ youth progressing inevitably towards responsible freedom, his neo-conservative counterpart is treated in no uncertain terms as other. As Squires explains, New Labour clearly views anti-social behaviour not as normal adolescent conduct but ‘the seedbed of delinquency, the beginning of a persistent offending career’.<sup>44</sup> However, this criminology of the other is unlike its welfarist predecessor. In line with other aspects of contemporary social policy, governance of youth anti-social behaviour is increasingly (but not wholly) organised around neo-conservatism’s moralistic aetiology of criminal conduct.<sup>45</sup> Rose notes that under advanced liberal forms of rule:

The pervasive image of the perpetrator of crime is not one of the juridical subject of the rule of law, nor that of the social and psychological subject of criminology, but of the individual who has failed to accept his or her responsibilities as a subject of moral community.<sup>46</sup>

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<sup>42</sup> P. O’Malley, ‘Volatile and contradictory punishment’ (1999) 3(2) *Theoretical Criminology* 175 at 185-189.

<sup>43</sup> S. Driver and L. Martell, ‘New Labour’s communitarianisms’ (1997) 17(3) *Critical Social Policy* 27.

<sup>44</sup> P. Squires, ‘New Labour and the politics of anti-social behaviour’ (2006) 26(1) *Critical Social Policy* 144 at 147.

<sup>45</sup> A. Haworth and T. Manzi, ‘Managing the underclass: interpreting the moral discourse of housing management’ (1999) 36(1) *Urban Studies* 153.

<sup>46</sup> Rose, op. cit. n. 6, p. 337.

The ‘anti-social’ youth subject is assumed to be quite capable of responsible freedom, but has selfishly refused to exercise it. The neo-conservative criminology of the other frames anti-social behaviour in terms of disrespect and irresponsibility, rather than a natural part of growing up, or a symptom of blameless pathology.

Neo-conservative reconstruction of the ‘anti-social’ youth has had important consequences for the rationalities and technologies deployed in their governance. As we have seen, the welfarist criminology of the other places a considerable degree of faith in the ability of social work to normalize anti-social youth. Conversely, the move from an explanation of the causes of anti-social behaviour focused in part upon pathology to one defined in terms of an outright refusal to exercise responsible freedom leads inevitably to the conclusion that the disciplinary role of social work is governmentally irrelevant. The source of appropriate governance of anti-social behaviour rests not with professional intervention but, instead, with the ‘anti-social’ youth him or herself. Moreover, the most appropriate way in which to govern the subject is assumed to be the residual technologies of what Mitchell Dean terms ‘authoritarian governmentality’.

Dean recognises that, while the advanced liberal state has increasingly sought to govern through subtle forms of disciplinary and ethopolitical technique, direct sovereign rule continues for ‘certain populations held to be without the attributes of responsible freedom.’<sup>47</sup> He explores the ways in which crime control continues to rely upon ‘despotic’ forms of government where the subject has failed to engage in effective processes of ethical self-governance. He describes this as ‘authoritarian governmentality, [or] ... non-liberal and explicitly authoritarian types of rule that seek to operate through obedient rather than free subjects, or, at a minimum, endeavour to neutralize opposition to authority.’<sup>48</sup> Neo-conservative discourse presumes that, rather than independently exercising appropriate self-governance, or requiring the disciplinary intervention of social work, the ASBO subject has actively rejected the demand to exercise his inherent capacity for responsible freedom. Given this combination of capacity, and unwillingness, to respond to ethopolitical exhortation, governance must be installed instead through the direct sovereign prohibition of the order’s criminal sanction.<sup>49</sup>

The neo-conservative rejection of the rationalities of welfarist criminologies of everyday life and the other is reinforced further by concomitant challenges to the

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<sup>47</sup> M. Dean, op. cit. n. 14, p. 131.

<sup>48</sup> Id.

<sup>49</sup> Part of a new era of ‘contractual governance’: see A. Crawford, “‘Contractual governance’ of deviant behaviour” (2003) 30(4) *JLS* 479.

traditional *altruistic* justifications for welfarism. Neo-conservatism encourages an exclusionary rather than inclusionary approach towards the ‘anti-social’ youth subject. Because anti-social behaviour by young people is treated as evidence of a rejection of the moral norms of society, rather than part of growing up or pathology, society is absolved of its welfarist moral obligations towards those individuals. As Rose writes, within neo-conservative discourse,

[t]hose who refuse to become responsible, to govern themselves ethically, have also refused the offer to become members of our moral community. Hence, for them, harsh measures are entirely appropriate. Three strikes and you are out: citizenship becomes conditional upon conduct.<sup>50</sup>

Thus, the successful contemporary reconstruction of the ASBO subject as a symbol of a depraved and dangerous youth underclass<sup>51</sup> provides moral justification for the punitive and exclusionary potential of the order.<sup>52</sup>

Similarly, neo-conservatism has had a fundamental impact upon the right to anonymity for the ASBO subject. Once again, the construction of the ASBO subject as a morally degenerate other deals a blow to altruistic arguments for their protection from the stigma associated with publicity by fostering a sense of justified indignation at their apparent irresponsibility and disrespect. The shame that might ensue from publicity of anti-social behaviour is treated increasingly as a legitimate penalty for the ASBO subject, in much the same way as an adult offender. Indeed, the right of the ASBO subject to anonymity is viewed as a startling illustration of the degree to which the welfarist state had become ‘soft’ on youth crime. Moreover, neo-conservatism poses an apparently coherent challenge to the governmental objectives behind the right to anonymity. The Government’s disconcerting silence on the issue of labelling should be treated as an implicit neo-conservative rejection of this welfarist ethopolitical strategy.

It is, of course, fairly unsurprising that New Labour would be reluctant to entertain an ethopolitics of labelling. As we have seen, the theory advocates that formal criminal justice measures should be avoided whenever possible in the governance of ‘anti-social’ youth. Conversely, neo-conservatism dictates that it is not the intervention of the criminal justice system into the lives of ‘anti-social’ youth, but its historic *failure*

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<sup>50</sup> Rose, op. cit. n. 2, p. 267.

<sup>51</sup> H. Davis and M. Bourhill, “‘Crisis’: the demonization of children and young people’ in Scruton, op. cit. n. 28.

<sup>52</sup> The neo-conservative claim that the authoritarian governance of the ASBO is an effective way to maintain control over populations is of course contentious. Recent empirical research reveals that the ASBO breach rate has risen to over 50 per cent: National Audit Office, *Tackling Anti-social Behaviour*, HC 99 Session 2006-2007 (2006), p. 19; Policy Research Bureau and NACRO, *Anti-social Behaviour Orders* (2006).

to intervene, that has led to an apparently pervasive youth culture of disrespect and irresponsibility. Consequently, the Respect agenda has brought low level disorder by young people within the net of the criminal justice system, responding to it instead through the authoritarian governmentality of formal, sovereign processes of enforcement such as the ASBO.

More importantly, neo-conservatism also challenges the knowledge claims of labelling theory. I have argued that the ethopolitics of labelling depends for its power as a rationality upon a particular, welfarist construction of 'anti-social' youth. It assumes that the youth ASBO subject is both capable of and willing to exercise responsible freedom, achievable either independently or, where the conduct is deemed pathological, with the support of the disciplinary processes of social work. The ultimate concern of an ethopolitics of labelling is that a young person's inevitable progress to responsible freedom will be undermined by the countervailing processes of community stigma arising from publicity, encouraging the 'anti-social' subject to actively reject those moral norms. Yet labelling theory fails under a neo-conservative reconstruction of the ASBO subject. Rather than progressing steadily towards appropriate ethical self-governance, the neo-conservative youth subject is assumed to have *already* rejected outright society's moral demands. Thus, he is positioned, not as a subject at risk of descent from circuits of inclusion to circuits of exclusion,<sup>53</sup> but one operating firmly within those latter circuits from the outset. Accordingly, stripped of its original preventative welfarist rationale, the governmental possibilities of anonymity can be increasingly ignored.

### 3. THE RISE OF YOUTH PUBLICITY AS AN ETHOPOLITICAL TECHNOLOGY

Thus far, I have argued that the perceived value of anonymity, as an ancillary mechanism designed to protect young offenders from the impact of community stigma for both altruistic and governmental reasons, has been undermined by neo-conservative representations of the ASBO subject. It is the further contention of this section that the (at least partial) movement from welfarism to advanced liberal forms of rule within youth justice policy has ensured not only the fall of anonymity, but the simultaneous *rise of publicity* in the governance of the ASBO subject. In 2006, the Home Office released guidance to practitioners on ASBO publicity, setting out a number of justifications for its use: enforcement of the order; public reassurance about safety;

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<sup>53</sup> Rose, op. cit., n. 6.



public confidence in local services; deterrence to perpetrators and deterrence to others.<sup>54</sup> These justifications provide the basis for the following analysis, which highlights how publicity of the ASBO subject as a governmental technology confirms much of the recent work of the governmentality school on the current state of advanced liberal crime control policies. In particular, the justifications reflect the Labour government's broader neo-liberal efforts to harness the governmental potential of 'responsibilized communities'.<sup>55</sup>

Numerous commentators have explored the implication of communities in advanced liberal governmental strategies.<sup>56</sup> Indeed, notwithstanding the inherent ambiguity of the term, New Labour's focus upon the community colours its own brand of neo-conservative politics; communitarianism, providing an apparent compromise between the rampant individualism of Thatcherism and the wholesale public provision of the social. In particular, the governmentality school note the expectations increasingly placed upon the community in terms of its crime control responsibilities.<sup>57</sup> Flint contends that the ethopolitics of responsibilized community are based upon two broad assumptions:

First, that neighbourhood or community processes themselves impact on levels of disorder, and second, that there is a need to re-establish norms of behaviour and values held in common between citizens. Community therefore becomes both a territory and a means of governing crime and disorder.<sup>58</sup>

As the following sections explain, there are two ways in which publicity operates to harness the governmental potential of responsibilized community. An ethopolitical strategy exists to improve communities by engaging them in surveillance of the ASBO, while communities are also implicated in the ASBO subject's own self-governance as part of a developing ethopolitics of shame.

### **(a) Governing through community: the ethopolitics of surveillance**

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<sup>54</sup> Home Office, op. cit. n. 34, p. 2.

<sup>55</sup> J. Flint, 'Housing and ethopolitics: constructing identities of active consumption and responsible community' (2003) 32(4) *Economy and Society* 611.

<sup>56</sup> Rose, op. cit. n. 5, pp. 331-7. Outside the governmentality school, see A. Crawford, *The Local Governance of Crime: Appeals to Community and Partnership* (1997).

<sup>57</sup> J. Flint, 'Return of the governors: citizenship and the new governance of neighbourhood disorder in the UK' (2002) 6(3) *Citizenship Studies* 245; P. O'Malley and D. Palmer, 'Post-Keynesian policing' (1996) 25(2) *Economy and Society* 137; K. Stenson 'Community policing as a governmental technology' (1993) 22(3) *Economy and Society* 373.

<sup>58</sup> Flint, id., p. 249.

Historically, crime control in the United Kingdom has been the exclusive task of the formal agents of the criminal justice system; one of the consequences of the social model of collective security adopted during the 19<sup>th</sup> and 20<sup>th</sup> century.<sup>59</sup> Increasingly, however, under advanced liberal rule, neo-liberal pressures have encouraged the responsabilization of the individuals and organizations of the private sphere as agents of law enforcement. This is no more evident than community policing strategies, including most recently the governance of ‘anti-social behaviour’. Indeed, the ASBO is itself a clear example of the responsabilization of agencies beyond the formal criminal justice system: it was designed not only for the use of police authorities, but also local authorities and social landlords.<sup>60</sup> Following the enactment of the Serious Organized Crime and Police Act 2005, the Government is now also able to add to the list of relevant agencies by statutory instrument,<sup>61</sup> and empower local authorities to contract out their ASBO functions to specified private organisations.<sup>62</sup>

As O’Malley and Palmer note, ‘one set of aims and effects of community policing may be to co-opt the population in processes of routine surveillance, and to increase the flow of information coming to the police’.<sup>63</sup> This surveillance aspect of community responsabilization is particularly evident around the ASBO. Its efficacy as a sovereign form of rule clearly depends upon enforcement of its terms, necessitating intensive oversight of the young person subject to the order. However, orders often cover wide geographical areas and a broad range of behaviour, and as such the police and local authorities are unlikely to have the resources required to patrol each and every possible breach. It is unsurprising, then, that the community has been recognised by the Government as key to the policing of the ASBO, allowing continuous, informal surveillance of the order.<sup>64</sup> Most telling, perhaps, is Campbell’s conclusion, based upon empirical research on the operation of the order, that local agencies themselves view

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<sup>59</sup> Rose, op. cit. n. 5, p. 335.

<sup>60</sup> CDA 1998, s. 1.

<sup>61</sup> CDA 1998, s. 1A. The list was recently extended in this way to include the Environment Agency and Transport for London: Crime and Disorder Act 1998 (Relevant Authorities and Relevant Persons) Order 2006.

<sup>62</sup> CDA 1998, s. 1F. The Government has recently proposed to allow local authorities to contract out these responsibilities to private organizations that manage their social housing: Draft Local Authorities (Contracting out of Anti-social Behaviour Order Functions) (England) Order 2007. It also plans to extend these powers to include Tenant Management Organisations (TMOs), private tenant-led institutions granted powers to part-manage social housing: Department of Communities and Local Government, ‘Press release: new powers for tenants to tackle anti-social behaviour – Kelly’, 9 January 2007, p. 2.

<sup>63</sup> O’Malley and Palmer, op. cit. n. 57, p. 137. A contemporary example is the increasingly complex relations between private, municipal and public forms of visible policing: A. Crawford, S. Lister, S. Blackburn and J. Burnett, *Plural Policing: The Mixed Economy of Visible Patrols in England and Wales* (2005).

<sup>64</sup> Home Office, op. cit. n. 34, p. 2.

publicity as important 'because it [spreads] the responsibility of enforcement around the community',<sup>65</sup> capturing perfectly the neo-liberal rationalities behind the appeal to communities in this context.

On one analysis, then, the extension of responsibility for surveillance of the ASBO to communities is a straightforward example of neo-liberal responsabilization, with 'members of the public being constituted as competent and skilled agents' of crime control.<sup>66</sup> It appears, however, that the governmental mentalities behind this particular process of responsabilization are broader than this. As Flint notes, community is viewed simultaneously as both a ready source of governmental power and a target for ethopolitical strategies. Indeed, behind the responsabilization strategy one can identify a desire not only to better govern the ASBO subject, but additionally to better govern the community itself. The Home Office guidance states that

ASBOs are community-based orders that involve local people not only in the collection of evidence but also in helping to enforce breaches. By their nature they encourage local communities to become actively involved in reporting crime and disorder and contributing actively to building and protecting the community.<sup>67</sup>

Here, the Government confirms explicitly that the surveillance role of the community is part of a more general ethopolitical strategy to create an 'active citizenry' willing and capable of civic engagement; part of its commitment to what it terms civil renewal.<sup>68</sup>

In 2004, Alvaro Gil-Robles, the previous Commissioner for Human Rights of the Council of Europe, assessed the human rights implications of the ASBO. Recognising that responsibility for the surveillance of the ASBO had been passed to communities, he states: 'I cannot help but be somewhat uneasy over [the] transfer of policing duties to local residents'.<sup>69</sup> He makes no further attempt to elaborate upon his concerns. I would make two observations, however, about the possible negative repercussions of responsabilization of communities in this context. On the one hand, given that the need for effective enforcement of the ASBO through publicity involves a direct trade-off with the right to anonymity, Gil-Robles' fears may spring partly from a welfarist construction of the ASBO subject as vulnerable and a concomitant belief in youth anonymity as an altruistic and governmental necessity. On the other, a further criticism might be levelled at the Government's specific adoption of surveillance as an

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<sup>65</sup> S. Campbell, *A Review of Anti-social Behaviour Orders* (2002), p. 102.

<sup>66</sup> O'Malley and Palmer, op. cit. n. 57, p. 137.

<sup>67</sup> Home Office, op. cit. n. 34, p. 9.

<sup>68</sup> Civil Renewal Unit, *Together We Can: The Government Action Plan for Civil Renewal* (2005).

<sup>69</sup> Gil-Robles, op. cit. n. 37, para. 119.

ethopolitical technique to foster active citizenship within communities. Prior has recently challenged the apparently inevitable benefits of active citizenry and civil renewal. As he forewarns:

There may be inherent flaws in this conceptualisation of a virtuous spiral involving the agendas of civil renewal and community safety, because the latter is as likely to generate relationships based on suspicion as it is those based on trust. ... [C]ertain forms of community safety initiative are likely to reproduce and possibly exacerbate inherent dynamics of social exclusion that exist within communities.<sup>70</sup>

Arguably, the Government's ethopolitics of surveillance, encouraged by publicity of the ASBO subject, pits the community against the ASBO subject in a relationship of mutual suspicion. As such, it has the potential to promote an active citizenry of a firmly neo-conservative, exclusionary bent.

#### **(b) Governing through community: the ethopolitics of shame**

Rose describes ethopolitical strategies as operating 'through the self-steering forces of honour and shame, or propriety, obligation, trust, fidelity, and commitment to others'.<sup>71</sup> Harnessing these internal processes is central to advanced liberal efforts to govern, from a distance, by encouraging a subject's own powers of ethical self-improvement. The governmental efficacy of shame, like each of these ethopolitical processes, requires subjects to be bound by what Vaughan terms an 'emotional attachment' to 'appropriate "webs of belonging"'.<sup>72</sup> Increasingly, it is one's community that has been identified as the territory within which those webs can be found, and, accordingly, where an ethopolitics of shame must necessarily take place. Indeed, in line with these developments, the following section explores how the granting of an ASBO is expected to encourage the ASBO subject, through shame, to work on themselves and align themselves again with the norms of the community. Publicity, in this context, is intended to intensify the ethopolitical power of shame through the widest possible transmission of the ASBO subject's details and offending conduct.

Shame as a governmental technique appears to be a fairly uncontroversial ethopolitical objective in relation to adult offenders. For instance, Spencer implicitly

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<sup>70</sup> D. Prior, 'Civil renewal and community safety: virtuous policy spiral or dynamic of exclusion?' (2005) 4(4) *Social Policy & Society* 357 at 364.

<sup>71</sup> Rose, op. cit. n. 6, p. 324.

<sup>72</sup> Vaughan, op. cit. n. 7, p. 348.

identifies this aspect of publicity of criminal proceedings when he writes that for adults it appears well-established that ‘the risk of public shame [through media publicity] is part of the law’s system of deterrents’.<sup>73</sup> Welfarism within youth justice, however, has tended to highlight the inappropriateness, both altruistic and governmental, of governance through shame, particularly in light of the implications of publicity for the labelling of the young offender. It is contended, however, that in an advanced liberal era, in which the role of welfare within youth justice policy has been increasingly undermined, shame is now viewed within certain political discourse as an appropriate technique for the governance not only of adults but children too. Indeed, the evidence suggests that shame is a technology employed increasingly by local agencies as part of their ASBO strategies. For example, Medway Council recently admitted before the High Court that it had deliberately employed publicity in order to shame a 13-year-old ASBO subject.<sup>74</sup> Notable too is Guildford council’s ‘wall of shame’ on which images of ASBO recipients are projected.<sup>75</sup>

It is perhaps surprising, then, that in its guidance on the use of publicity the Government has explicitly refused to acknowledge the role of shame as a governmental technique: ‘[p]ublicity is not intended to punish, shame or embarrass the individual’.<sup>76</sup> The Government’s recalcitrance in advocating an ethopolitics of shame appears strange, given its own neo-conservative construction of the ASBO subject as other, and the concomitant punitive discourses that underpin other aspects of its anti-social behaviour policies. Indeed, I believe that in reality the valorisation of shame fits the Government’s own communitarian sensibilities. However, I would suggest that its apparent rejection of this governmental technique could simply reflect a pragmatic concern that explicit advocacy of the shaming of the ASBO subject would simply be too Draconian for many members of the electorate to accept, persuading it to emphasise the more rational objective of effective public surveillance of the order instead. If so, the decision illustrates the continued possibility of a role for welfarist resistance in policy formation; an issue returned to in the final part of this paper. It also highlights the limits of the predominantly textual approach of this paper, perhaps leaving hidden much of the true nature of the rationalities and technologies operating around the ASBO subject.

Nevertheless, notwithstanding the Government’s own rhetoric, the law, as the authorizer of governmental techniques, has taken a different approach to the regulation

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<sup>73</sup> Spencer, op. cit., n. 29, p. 466.

<sup>74</sup> *Medway Council v BBC* [2002] 1 FLR 104, para. 6.

<sup>75</sup> Squires with Stephen, op. cit. n. 9, p. 523.

<sup>76</sup> Home Office, op. cit. n. 34, p. 2.

of the right to anonymity under the 1933 Act. In the leading case of *T v St Albans Crown Court*,<sup>77</sup> the High Court considered the factors that a judge could appropriately take into account when deciding whether a section 39 order, guaranteeing the anonymity of the ASBO subject, should be granted. In so doing, Elias J commended the earlier pronouncement of Simon Brown LJ that:

The prospect of being named in court with the accompanying disgrace is a powerful deterrent and the naming of defendant in the context of his punishment serves as a deterrent to others. These deterrents are proper objectives for the court to seek.<sup>78</sup>

Following this precedent, he concluded that ‘as far as shaming may, and often will, have a legitimate deterrent effect, it is a relevant factor to weigh against its potential adverse effect.’<sup>79</sup> Shame, then, has been authorised by law as a technology of rule, notwithstanding both the Government’s refusal to countenance its use, broader welfarist concerns with its exclusionary effects, and its questionable effectiveness as a governmental technique.

These judicial developments provide an important insight into the role that law plays, independently of politics, in the formation of mentalities of governance. Simon Brown LJ’s assumption about the value of shame – its position as a ‘powerful tool’ - illustrates the law’s position as a particularly dominant source of expertise in the construction of ‘truths’ about the appropriate subjectification of the target of governance. Moreover, it highlights how, through the process of legal precedence, this knowledge can transfer to the governance of new subjects (in this case, the target of an ASBO) without the need for reconsideration of its relevance in the new context. Indeed, what is interesting is the absence of even the most basic evidence to support Simon Brown LJ’s claim. Consequently, the law has been able to authorize an absolute rejection of the ethopolitics of labelling in favour of the neo-conservative ‘common-sense’ of shame, notwithstanding that it is, in reality, of debatable value according to other expert discourses.

Before proceeding, I want to note finally an interesting implication of the move towards community-based governance of the ASBO subject for our genealogy of youth anonymity. As contended from the outset, the rise of anonymity as a governmental technology was, in part, an attempt by the welfare liberal state to *restrict* the operation of community-based processes as they relate to the young offender, as it was perceived

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<sup>77</sup> [2002] EWHC 1129.

<sup>78</sup> *R v Winchester Crown Court, ex parte B* [2000] 1 Cr App R 11 at 13.

<sup>79</sup> [2002] EWHC 1129, para. 22.

that these processes, in the form of community stigma, would undermine their progress to responsible freedom, by classifying them as deviant. Yet now, as a consequence of the neo-liberal rationalities underpinning advanced liberalism, community (rather than the state) has been elevated to a prominent role in the governance of the ASBO subject. Rather than attempting to remove the ASBO subject from the disciplinary circuits of communities, the latter has become now an integral component of his or her control. The welfarist ethopolitics of labelling, fearful of the governmental processes of community, have been superseded by the advanced liberal ethopolitics of shame, with those processes at its core.

Yet once again, notwithstanding the growing acceptance of an ethopolitics of shame, its value as a technique for the governance of the ASBO subject is contentious. One concern is that communities may well not be able to impose the necessary ‘webs of belonging’ within which the behaviour of the ASBO subject can be contained. There is a tendency under neo-liberalism to construct communities idealistically as inherently capable of effective self-regulation, if only they were allowed to do so by an overbearing state. John Flint, however, argues convincingly that all too often the necessary social capital required to do so is unavailable in the deprived communities most in need of the power of governance over its members.<sup>80</sup> Either the required social cohesion no longer exists within a community, or it exists but an absence of collective efficacy prevents it from being deployed. Indeed, Flint contends that it was the fact that the appeal to responsibilized communities proved so unsuccessful in the areas suffering from the most debilitating forms of anti-social behaviour that forced the Government to resort to direct intervention through, *inter alia*, the ASBO.

The ethopolitics of shame may also prove ineffectual because many ASBO subjects are governed not by the disapproving community, but by competing governmental forces operating at the local level. As noted earlier, Stenson recognises, as part of his focus upon the continued relevance of sovereign rule under advanced liberalism, that the governors of nation states have found their sovereignty increasingly challenged by competing forces, both supra- and sub-national. He explains that, at the sub-national level,

ethnic, religious, criminal and other sites of governance in civil society do more than resist state power. They have their own agendas of governance, forms of

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<sup>80</sup> Flint, op. cit. n. 57, p. 254.

knowledge and expertise deployed to govern and maintain solidarity in and over their own territories and populations.<sup>81</sup>

Accordingly, sovereign forms of governance are often employed to reinstate control over particular political and geographical spaces.<sup>82</sup> Returning to the specific ethopolitics of shame, it might be argued that in certain circumstances the ASBO subject will be governed more successfully by the competing forces of what Stenson refers to as ‘youth self-organization’,<sup>83</sup> or governance by his or her peer group.

Indeed, evidence suggests that the ASBO subject could in fact be tied into the competing web of his or her peer group much more firmly than that of the disapproving community. Resistance to the ethopolitics of shame as a consequence of the ASBO subject’s position within processes of youth self-organization may help to explain the conclusion of recent research into attitudes towards ASBOs among young people carried out by NACRO and the Policy Research Bureau that both the imposition and publicising of an ASBO acts as a badge of honour, rather than shame, for certain individuals.<sup>84</sup>

That is not to say that shame is an inherently ineffective governmental technique. John Braithwaite, in his seminal research on governance through shame, argued convincingly that shame can have positive consequences for social control.<sup>85</sup> However, at the heart of Braithwaite’s thesis was, of course, the fundamental distinction drawn between disintegrative and reintegrative forms of shaming. Only the latter approach, in which concerted efforts are made to integrate the subject back within appropriate ‘webs of belonging’, will succeed in harnessing the ethopolitical value of this powerful emotion. In the absence of reintegrative modes of shaming, as Schur once pointed out, the exclusionary impact of labelling through publicity may simply reinforce the ASBO subject’s sense of association with other anti-social youth and consequently exacerbate that conduct.<sup>86</sup> Indeed, given the demonisation evident in increasingly sensationalist reporting of the ASBO subject, discussed below, the neo-conservative faith in publicity

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<sup>81</sup> Stenson, op. cit. n. 16, p. 267.

<sup>82</sup> The ASBO is, of course, an excellent illustration of the fight for territorial control, permitting a court to exclude particular groups, such as drug-dealers, competing with police for sovereignty over physical spaces: see, for example, *R (on the application of Kenny and M) v Leeds Magistrates’ Court* [2003] EWHC 2963.

<sup>83</sup> Stenson, op. cit. n. 16, p. 274.

<sup>84</sup> Policy Research Bureau and NACRO, op. cit., n. 53. See, also, M. Thomas, K. Vuong and J. Renshaw, ‘ASBO targets youths, but to what effect?’ (2004) *Safer Society*, No 23 (Winter).

<sup>85</sup> J. Braithwaite, *Crime, Shame and Reintegration* (1989) and ‘Shame and modernity’ (1993) 33 *Brit J of Crim* 1.

<sup>86</sup> Schur, op. cit. n. 31.



as a way to promote an ethopolitics of shame may, on a welfarist analysis, prove dangerously counter-productive.

#### 4. THE RISE OF YOUTH PUBLICITY AS A SOVEREIGN TECHNOLOGY

Stenson's reconsideration of sovereign rule reveals how governance is directed not only towards the effective management of individuals and populations, but the control of territory itself.<sup>87</sup> The state has grown increasingly worried about its own governmental limitations, particularly in the face of the pressures of globalisation, transfer of powers to supranational organisations such as the EU and competing claims by communal groups seeking to govern certain populations from below, such as the forces of 'youth self-organization' discussed above. As David Garland recognises, one important way in which the state has sought to regain sovereign control over its political and geographical territory (in terms of electoral success) has been the use of authoritarian crime control to confirm its own authority; flexing its muscles to 'give the impression that something is being done – here now, swiftly and decisively'.<sup>88</sup> Thus, under advanced liberal rule, the sovereign governance of crime is both instrumental and *expressive*.

Expressive forms of sovereign rule are clearly evident behind the politics of anti-social behaviour.<sup>89</sup> As Squires notes, 'the Law and Order issue', of which the Respect agenda is central, has 'undoubtedly been the making of New Labour'.<sup>90</sup> Crawford adds that,

[t]he current governmental preoccupation with petty crime, disorder and ASB reflects a sense of 'anxiety' about which something can be done in an otherwise uncertain world.<sup>91</sup>

Importantly, because the concept of anti-social behaviour is politically constructed, it provides the Government with an opportunity to take control of the issue and define both the problem and its solution, with the Respect agenda,

in part at least, an attempt by government to engage directly in a politics of representation about law, order and public safety, an attempt to influence public perceptions directly.<sup>92</sup>

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<sup>87</sup> Stenson, op. cit. n. 11.

<sup>88</sup> Garland, op. cit. n. 3, p. 135.

<sup>89</sup> I. Brownlee 'New Labour – new penology? Punitive rhetoric and the limits of managerialism in criminal justice policy' (1998) 25(3) *JLS* 313.

<sup>90</sup> Squires, op. cit. n. 47, p. 146.

<sup>91</sup> A. Crawford, 'The governance of crime and insecurity in an anxious age: the trans-European and the local' in A. Crawford (ed) *Crime and Insecurity: The Governance of Safety in Europe* (2002), pp. 31-2.

<sup>92</sup> P. Squires and D. Stephens, *Rougher Justice: Anti-social Behaviour and Young People* (2005), p. 19.

The representation that the Government has sought to put forward is an image of a strong state apparatus, capable of effectively tackling the problem of anti-social behaviour, in order to reduce the fear of crime and, accordingly, reinforce its sovereign state by securing the political faith of the electorate.

Hughes and Follett argue that the ASBO is itself an illustration of expressive, as well as instrumental, sovereign rule.<sup>93</sup> The mechanism has proved highly mediagenic, representing to the public the toughness of the Respect agenda, and indeed is viewed by the Government as integral to its electoral success.<sup>94</sup> Moreover, representations of the ASBO are not simply valuable to national government. Local agencies too are able to secure their own positions through displays of sovereign strength. The empirical work of Thomas et al supports this conclusion, suggesting that local agencies are often more interested in using ASBOs to provide reassurance to the community, rather than believing that the order can really change behaviour.<sup>95</sup> In many cases the external, expressive objective of the order takes precedence then over its internal, ethopolitical value. Clearly, for the Government, publicity is vital to the successful deployment of the ASBO as an expressive act of state sovereignty. As its guidance makes clear, publicity is further justified 'as a way to restore public confidence in local services'.<sup>96</sup> Publicity of the ASBO subject is viewed as a symbol of the power of local agencies to tackle not only anti-social behaviour, but also their competence in all forms of public provision.

However, the pursuit of expressive forms of sovereignty poses inevitable governmental dangers. In its effort to shore up faith in national and local government through publicity, Labour has manipulated the fear and insecurity of the public. Yet, ultimately it may find itself unable to meet the expectations it has created. Tonry contends that

by making anti-social behaviour into a major social policy problem, and giving it sustained high visibility attention, Labour has made a small problem larger, thereby making people more aware of it and less satisfied with their lives and their government.<sup>97</sup>

Indeed, one might note the internal contradictions in the Government's own justifications for publicity of the ASBO subject. One of the additional objectives of

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<sup>93</sup> G. Hughes and M. Follett, 'Community safety, youth and the "anti-social"' in Goldson and Muncie, op. cit. n. 21, p. 165.

<sup>94</sup> Squires and Stephens, op. cit. n. 92, pp. 14-15.

<sup>95</sup> Thomas et al, op. cit. n. 84.

<sup>96</sup> Home Office, op. cit. n. 34, p. 2.

<sup>97</sup> M. Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (2004), p. 57.

publicity, according to the guidance, is to reassure the public about their safety.<sup>98</sup> Yet as Jamieson points out, media attention to the issue may well lead to the ‘paradoxical outcome’ that the public’s fear of crime actually increases.<sup>99</sup>

The problem, of course, is that the construction of the debate, at the level of explicit central government discourse at least, is one skewed in favour of punitive responses to anti-social behaviour such as the ASBO. Notwithstanding the continued evidence of welfarist discourses operating around the ASBO subject in practice, the Government is only tentatively willing ‘to associate [itself] publicly with, and to promote, responses to offending that are not exclusively punitive’.<sup>100</sup> New Labour’s war against anti-social behaviour has actually increased the public’s fear of crime, while in reality crime rates continue to fall, threatening to create a ‘punishment deficit’ between supply and demand of punishment at both national and local level.<sup>101</sup> Moreover, publicity of the ASBO subject could encourage both local and national governments to move even further towards authoritarian solutions to anti-social behaviour. Indeed, that this may cause serious problems for the continued sovereignty of both national government and local agencies is evident in Campbell’s warning, following her empirical research into the use of ASBOs, that where local agencies engage in major publicity of orders granted in the area, ‘[m]anaging the expectation such a campaign may create is potentially problematic for partnerships’.<sup>102</sup>

## 5. MOVING TOWARDS SENSATIONALISM?

This paper has contended that the deployment of publicity of the ASBO subject reflects the simultaneous deployment of three components of advanced liberal rule. First, publicity seeks to responsibilize communities as agents of crime control, and to promote an ethopolitics of active citizenship, by encouraging surveillance of the ASBO. Second, and controversially, the courts have authorized publicity of the ASBO subject as part of an ethopolitics of shame. Third, and finally, publicity is viewed by national and local government as a way to augment sovereign governance of the electorate, by reducing their fear of crime and consequently increasing faith in the state. In this final section I want to draw together these components of publicity as governmental technology – surveillance, sovereignty and shame - and conclude about their implications for the

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<sup>98</sup> Home Office, op. cit. n. 34, p. 2.

<sup>99</sup> J. Jamieson, ‘New Labour, youth justice and the question of “respect”’ (2005) *Youth Justice* 180 at 186.

<sup>100</sup> Brownlee, op. cit. n. 89, p. 333.

<sup>101</sup> Id.

<sup>102</sup> Campbell, op. cit. n. 65, p. 81.

ASBO subject. My first point, very simply, is that anonymity will be increasingly waived in ASBO proceedings under section 39. Neo-conservative constructions of the ASBO subject undermining the altruistic and governmental role of anonymity, together with the new justifications for publicity of the order, will inevitably impact upon judicial decision-making; an issue explored further in the following section.

Additionally, however, it is likely that publicity will contain increasingly 'sensationalist' representations of the ASBO subject. By sensationalism, I refer to publicity that reinforces the image of the ASBO subject as other through lurid reportage. Exploring this concept further, it is first necessary to identify two sources of ASBO publicity. The first source is, of course, the private media, arising from its traditional role in the reporting of legal proceedings. Harnessing the private media is particularly important for local agencies, according to the Home Office guidance, because their wider distribution allows publicity to reach a large number of individuals within a community affected by anti-social behaviour. Interestingly, from a governmental perspective, the guidance adds that local agencies that impose ASBOs should ensure that they actively engage in the governance of ASBO reportage by the private media. It points to the need to establish 'working relationships' with local media outlets, while emphasising the importance of close control of the material to ensure that the well-being of witnesses and vulnerable defendants are not jeopardised by unsanctioned disclosures.<sup>103</sup> However, it is important to recognise, secondly, that ASBO publicity is carried out not only by the private media but 'in-house' by the public (or quasi-public) agencies who actually impose the orders, in the form of leaflets and website information distributed to local residents.

I would argue that both these sources of publicity, private and public, are susceptible to sensationalism, but for markedly different reasons. With respect to the private press, sensationalism is of course an inevitable consequence of the commercial pressure to pursue newsworthy content that will attract readership and ensure maximum sales.<sup>104</sup> Tabloid newspapers, in particular, tend to secure the attention of a prurient readership by constructing the ASBO subject as a depraved and dangerous other. Indeed, Thomas et al confirm that the press explicitly seeks to sensationalise material about ASBO subjects.<sup>105</sup> More interesting, however is the impact of the increasing number of public agency forms of sensationalist publicity. It has been noted, for

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<sup>103</sup> Home Office, op. cit. n. 34, pp. 7-8.

<sup>104</sup> R. Reiner, 'Media made criminality. The representation of crime in the mass media' in M. Maguire, R. Morgan and R. Reiner, *The Oxford Handbook of Criminology* (2002), p. 403.

<sup>105</sup> Thomas et al, op. cit. n. 84.

example, that after seeking ASBOs on grounds of particular anti-social conduct by young people a number of '[l]ocal authorities and police have released full, often lurid details of such behaviour and the youngsters have sometimes been prompted to strike aggressive poses for photographs'.<sup>106</sup> Public agencies are clearly not motivated by commercial considerations. What then is the explanation for sensationalism here?

Once again, the motivation of public agencies for such sensationalism can be analysed usefully from a governmental perspective. The issue was considered recently by the High Court under the Human Rights Act 1998 in *R (Stanley) v Metropolitan Police Commissioner*.<sup>107</sup> In that case 3,000 leaflets were distributed by Brent London Borough Council to members of the community containing details of a number of children subject to ASBOs. The document itself was clearly sensationalist, describing the individuals at one point as 'animalistic ... thugs and bully boys'.<sup>108</sup> The defence argued that the use of such words breached Article 8 of the European Convention. Kennedy LJ, however, was ultimately happy to allow for this incursion into sensationalism, judging the content of the leaflet entirely proportionate to the legitimate aim of the prevention of crime and disorder. He drew attention to the importance of sensationalism in order to ensure the governmental objective of the responsabilization of communities as agents of surveillance, describing the language as 'colourful, but ... needed in order to attract the attention of the readership'.<sup>109</sup> Thus, sensationalism has been authorized by law, through the *Stanley* judgment, as necessary to foster further an ethopolitics of surveillance.

However, notwithstanding the law's focus upon surveillance, it is contended that the legal authorization of sensationalism will also encourage public agencies to employ sensationalist reportage in pursuit of the other governmental objectives highlighted in this paper. First, sensationalism may be used to reinforce the deviancy of the ASBO subject as other, in order to shore up the community's fear of anti-social behaviour and, as such, their faith in, and dependency upon, these agencies. Second, it could be perceived as a way to increase the efficacy of an ethopolitics of shame. The more demonising ASBO publicity, it might be argued, the more the subject, and others contemplating engaging in anti-social behaviour, will be deterred by the impact upon their reputations. Of course, on the other hand, proponents of welfarism will continue to focus upon the negative impact such sensationalist reportage will have upon the ASBO

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<sup>106</sup> Humphries, op. cit. n. 33.

<sup>107</sup> [2004] EWHC 2229.

<sup>108</sup> Id., para. 24.

<sup>109</sup> Id., para. 40.

subject and his or her governance. Sensationalism, they will argue, further reinforces the deviancy of targeted young people, exacerbating the harm caused by stigmatisation and labelling, while the reinforcement of the criminology of the other exacerbates spiralling public fear of ‘anti-social’ youth and encourages authoritarian responses by the state to further its own sovereignty.

## 6. POSSIBILITIES OF WELFARIST RESISTANCE

Notwithstanding these conclusions, it is important to recognise that neo-conservative constructions of the ASBO subject are inevitably not absolute. As the governmentality school makes clear, rationalities and technologies do not follow a clear developmental chronology, and as such are never perfectly implemented in practice. As with general crime control, this is certainly the case with youth justice policy. Muncie warns that any assessment of the youth justice system must avoid constructing its development as a linear progression of rationalities:

The ‘new’ never replaces the old. In the twenty-first century discourses of protection, restoration, punishment, responsibility, rehabilitation, welfare, retribution, diversion, human rights and so on exist alongside each other in some perpetually uneasy and contradictory manner.<sup>110</sup>

It is particularly important to avoid overstating the apparent punitive turn in crime control policies.<sup>111</sup> Newburn notes that, in reality, New Labour’s stance on youth justice ‘is somewhat tricky to characterize, for ... one key element of the Government’s style was to “talk tough” while behind the scenes enabling sometimes more enlightened practices to be developed and promulgated’.<sup>112</sup> Not only do many central government initiatives continue to reflect welfarist rationales, but the implementation of authoritarian measures is often resisted at the local level.<sup>113</sup> Thus, the focus of discursive analysis upon the texts of central government can be criticised for failing to capture the empirical realities of the governance of young people resulting particularly

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<sup>110</sup> J. Muncie, *Youth and Crime: A Critical Introduction* (2004), p. 249.

<sup>111</sup> R. Matthews, ‘The myth of punitiveness’ (2005) 9(2) *Theoretical Criminology* 175.

<sup>112</sup> T. Newburn, ‘Young people, crime, and youth justice’ in M. Maguire et al, op. cit. n. 104, p. 559.

<sup>113</sup> J. Muncie, ‘Governing young people: coherence and contradiction in contemporary youth justice’ (2006) 26(4) *Critical Social Policy* 770. The governmentality school has been accused of failing to recognise the agency of local organisations. One might turn instead to the concept of ‘power dependence’ developed by Rod Rhodes, which contends that dependency of the state on local agencies to implement policies provides opportunities for resistance: see *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (1997).

from resistance to, and reconstruction of, rationalities and technologies by those who implement them and those upon whom they are implemented.

Hughes and Follett suggest that such contradictory responses are particularly evident in state governance of anti-social behaviour.<sup>114</sup> Indeed, on closer examination the implementation of the ASBO provides support for Pavlich's argument that advanced liberalism does not mark the death of the social, but merely the growth of 'co-social' forms of governance.<sup>115</sup> Burney contends, for instance, that the early failure of local agencies to take up the ASBO was, in part at least, a continued preference for welfarist forms of intervention.<sup>116</sup> Such evidence that exists suggests the ASBO subject remains a target of the disciplinary techniques of social work as a result of the continued welfarist approach to governance of many local agencies, particularly Youth Offending Teams (although recent research has concluded that the balance is still very much in favour of neo-conservative enforcement objectives).<sup>117</sup> Second, welfarist discourses also continue to operate at the level of central government. In particular, Individual Support Orders (ISOs), introduced by the Criminal Justice Act 2003,<sup>118</sup> mark the return of legal authorization for the formal repositioning of the ASBO subject within the disciplinary processes of social work, notwithstanding the Government's continuing promulgation of neo-conservative rhetoric.<sup>119</sup>

Developing this analysis, I would contend further that neo-conservative discourse cannot wholly undermine the pursuit of anonymity for ASBO subjects, given the evidence of resistance, on both altruistic and governmental grounds, of local agencies charged with their governance. Moreover, I would suggest, from a legal perspective, that the law authorising youth anonymity provides a space for contestation of the (neo-conservative) criminology of the other through individual acts of welfarist resistance. As Rose and Valverde explain:

[S]ubjects are constituted in a variety of ways in different legal contexts and forums. Each of these subjectifications has a history, each is differentially suffused by the norms and values of positive knowledge.

They continue:

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<sup>114</sup> Hughes and Follett, op. cit. n. 93.

<sup>115</sup> Pavlich, op. cit. n. 12, p. 4.

<sup>116</sup> Burney, op. cit. n. 9.

<sup>117</sup> Squires and Stephens, op. cit. n. 92.

<sup>118</sup> CDA 1998, ss. 1AA and 1AB.

<sup>119</sup> Although, of course, as breach of an order is punishable by criminal sanction (CDA 1998, s. 1AB), sovereign coercion continues to underpin this welfarist disciplinary process. See also the Intervention Order under CDA 1998, ss. 1G and 1H, enacted by the Drugs Act 2005.

A proper examination of such practices would have to attend to the technicalities of legal procedure, and to the ways in which non-legal knowledges can be introduced into legal forums ... A plurality of different forms of expertise have attached themselves to the institutions and procedures of the law. Disputes between biological, psychological, psychiatric and sociological forms of knowledge open a potentially inexhaustible space of disputation.<sup>120</sup>

What this passage reveals is the extent to which the exercise of judicial discretion can provide an environment within which competing constructions of the particular legal subject, in the form of knowledge and expertise, can be reconstructed.

Judicial decision-making under section 39 obviously provides one such forum into which alternative welfarist discourses could continue to permeate. Although under the section a presumption exists in favour of publicity, it can of course be rebutted by a judge in the public interest. There are two ways in which welfarist discourse, and particularly the ethopolitics of labelling, might be deployed to persuade a judge of the value of such an order. First, social workers can leverage their expertise to persuade a judge of the value of anonymity to the governance of a particular ASBO subject. By reintroducing welfarism within the courtroom neo-conservative discourses could give way to those positioning the ASBO subject as vulnerable to the negative ethopolitics of labelling and, accordingly, requiring protection from public stigma.

Second, it might also be possible within this forum to harness alternative legal standards that explicitly recognise the ethopolitical relevance of labelling. While labelling theory might carry little weight within the soft law of domestic governmental policy documents, internationally, the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') explicitly justifies the Article 8 right to privacy for juveniles in those ethopolitical terms. Article 8 reads in full: 'The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity *or by the process of labelling*. In principle, no information that may lead to the identification of a juvenile offender shall be published. The official commentary to the Article reads as follows: 'Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. *Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as 'delinquent' or 'criminal'* (my italics).

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<sup>120</sup> Rose and Valverde, op. cit. n. 17, p. 548.



Thus, within the governable space of the court room, opportunities still exist to reconstruct the ASBO subject in law through, for instance, the discourses of expert evidence or the competing power of international legal standards, both of which continue to promote an ethopolitics of labelling. Yet, while perhaps unduly pessimistic, I would contend finally that successful resistance at the level of the local is, in fact, unlikely. Without a fundamental change to the knowledge-power surrounding the ASBO subject, the rise of publicity as a governmental technique, particularly as part of an ethopolitics of surveillance and shame, will continue to place overbearing pressure upon courts to refuse to grant a section 39 anonymity order to an ASBO subject. Evidence suggests as much. According to the empirical research of Thomas *et al*, the Government's call for increased publicity of the ASBO, together with its recent legal reforms, mean that coverage of successful applications and enforcement of breaches are now indeed proving the norm.<sup>121</sup>

## CONCLUSIONS

This article positioned the problematization of youth anonymity in ASBO proceedings against a backdrop of the apparent move from a welfarist to an advanced liberal youth justice policy in England and Wales. In doing so, it contended through a genealogy of the principle that the assault upon anonymity is the result of two distinct processes: the fall of anonymity, and the rise of publicity, as governmental technologies. I argued, on the one hand, that the rejection of anonymity as an ethopolitical technique reflects the implicit dismissal of labelling theory within neo-conservative discourse. In its place, one finds a new belief in the value of publicity as part of the neo-liberal responsabilization of communities as agents of crime control through surveillance; part of a broader commitment to the ethopolitical strategy of the fostering of active citizenship, together with the shoring up of the sovereignty of national and local government. Moreover, within the courts at least, shame has been authorised as a valuable ethopolitical tool for the governance of the ASBO subject. I suggested, finally, that these objectives of surveillance, sovereignty and shame are each reinforced by increasingly sensationalist reportage, providing a possible explanation for this development among public agencies in particular.

It is a characteristic of Foucault's work that he avoids drawing normative conclusions about the value of particular forms of power, 'concentrating, instead, upon

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<sup>121</sup> Thomas et al, op. cit. n. 84.

the actual way in which power operates'.<sup>122</sup> It is an approach often criticised for precluding effective critique of advanced liberal forms of rule.<sup>123</sup> Throughout this paper, conversely, I have highlighted a number of possible welfarist concerns with the growth in the publicity of the ASBO subject.

Inevitably, governance through the publicity of ASBOs will further increase the stigmatisation of young people that the right to anonymity sought to avoid. The claim under neo-conservative reconstructions of the ASBO subject is that he or she is susceptible to the positive ethopolitics of shame, rather than the negative ethopolitics of labelling. As I have shown, however, the claimed potency of shame as a governmental technique does not seem to be borne out by the available empirical evidence, which suggests conversely that the ASBO subject are often not tied within the necessary webs of belonging to the disapproving elements of the community, but instead may be subject to the more powerful control of competing knowledge, in the form of youth self-organization, that promotes the ASBO as a badge of honour. One must also consider the possibility that labelling could ultimately undermine the effective governance of ASBO subjects. Indeed, deploying Braithwaite's empirical work in this area, disregarded by the common sense of neo-conservatism, disintegrative shaming of this kind has dangerous implications for social exclusion.

The ethopolitics of surveillance poses further problems. For instance, it has not been shown that policing is aided by the publicity of the ASBO subject; it is unclear how much, and how well, the community actually engages in effective surveillance of the order. It seems a little premature, then, for the Government to assume the need for publicity, at the expense of long-standing protections of anonymity, without question. I am also concerned that the use of surveillance as a form of ethopolitics may lead to the encouragement of a distorted form of active citizenry that reinforces the contemporary neo-conservative, exclusionary, conception of 'anti-social' youth. Furthermore, the pursuit of expressive forms of sovereign rule, in an effort to exert control over political territory, may ultimately cause both central and local government to lose control over the 'anti-social behaviour' problem. Indeed, with sensationalism reinforcing the demonisation of young people, both individually and collectively, as other, inclusionary technologies may prove increasingly unpalatable to a public reliant upon media representations of anti-social behaviour.

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<sup>122</sup> N. Fraser, 'Foucault on modern power: empirical insights and normative confusions' (1981) 1 *Praxis International* 272 at 273.

<sup>123</sup> D. Brown, 'Governmentality and law and order' in Wickham and Pavlich, op. cit. n. 12.

Finally, I have explored the particular part played by law and legal systems in ‘authorising’ governance through publicity. As I have contended, the structure of section 39 provides an important opportunity for law’s fielding of the various alternative discourses – classical, welfarist and advanced liberal – that currently operate around the right to anonymity of the ASBO subject. In particular, it is the structure of this section that provides an opportunity for particular welfarist discourses (of the expert evidence of social workers and the standards of international law) to reinvigorate both altruistic and governmental discourses that favour anonymity where they are deemed appropriate. My concern, however, is that pervasive neo-conservative constructions of the ASBO subject as other, together with the importance placed by the judiciary upon the value of the ethopolitics of surveillance and shame, will nevertheless lead to a drastic decrease in the granting of section 39 orders. Governance through anonymity looks likely to prove a further welfarist casualty of advanced liberal rule.

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